

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

James E. Pietrangelo, II,	:	
Plaintiff,	:	
	:	
v.	:	File No. 1:05-CV-311
	:	
U.S. District Court	:	
Vermont and Unknown Court	:	
Security Personnel,	:	
Defendants.	:	

ORDER
(Paper 28)

This case is currently on appeal. Plaintiff James Pietrangelo has filed a motion (Paper 28) to exclude from the appellate record a motion to dismiss submitted by the government on behalf of the U.S. Marshals Service (Paper 10). The government's motion to substitute the U.S. Marshals Services as a defendant was ultimately denied after Pietrangelo made clear that he wanted to proceed against the above-named defendants. (Paper 14). After the government's subsequent motion to dismiss was granted, Paper 10 was denied as moot. (Paper 24). Pietrangelo now argues that Paper 10 was an improper filing by a non-party, and as such should be stricken from the record on appeal.

Correction or modification of the appellate record is governed by Fed. R. App. P. 10(e), which states:

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record confirmed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

- (A) on stipulation of the parties;
- (B) by the district court before or after the record has been forwarded; or
- (C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

Fed. R. App. P. 10(e).

There is no dispute that the government filed a motion to dismiss on behalf of the U.S. Marshals Service. Even if the Court views the motion as "a nullity" for purposes of appellate review, it is nonetheless a filing that occurred in this Court. Subsection one is, therefore, not applicable.

Subsection two of Rule 10(e) pertains to erroneous misstatements or omissions with respect to matters that are "material to either party." Fed. R. App. P. 10(e)(2). There is no allegation that the inclusion of Paper 10 falls within the purview of this subsection. Under subsection three, all other questions about the content of the record must be presented to the court of appeals. Fed. R. App. P. 10(e)(3).

Pietrangelo argues that this Court "retains the ability and ground under its inherent powers to exclude" Paper 10. (Paper 20 at 5). Rule 10(e)(3), however, states that all

matters not specifically addressed under Rules 10(e)(1) or 10(e)(2) must be presented to the court of appeals. Since neither of those subsections apply here, the Court is without jurisdiction to exclude Paper 10, and Pietrangelo's motion is DENIED.

Conclusion

For the reasons set forth above, Pietrangelo's motion to exclude (Paper 28) is DENIED.

Dated at Brattleboro, in the District of Vermont, this 12th day of October, 2006.

/s/ J. Garvan Murtha

J. Garvan Murtha

United States District Judge